RECENT AMERICAN DECISIONS.

Court of Appeals of Kentucky.

WOOD v. FINNELL. SMITHEY v. FINNELL.

An action on the case will lie for the malicious prosecution of a civil suit without probable cause, although there was neither an attachment nor an arrest.

In such a case the fees of counsel, the expenses of witnesses, and all the reasonable expenses incurred in the defence of the malicious suit, in excess of the ordinary costs, should constitute the measure of damages.

The removal from one jurisdiction to another for the avowed purpose of bringing an action in the latter forum, does not raise any presumption of a want of probable cause.

THESE several actions were originally instituted in the court of Mercer, and by change of venue were heard in the Boyle Circuit Court. It was alleged, in substance, in each case, that the plaintiff and the defendant were both citizens of the county of Mercer, and the defendant, with the view and for the purpose of annoying the plaintiff, and to subject him to unnecessary trouble, left the county of his residence (Mercer) and falsely pretended to change his residence from the state of Kentucky to the state of Indiana; that he actually went to the state of Indiana, not for the purpose of residing there in good faith, but to enable him to institute an action in the Circuit Court of the United States within and for the district of Kentucky, held at the city of Louisville, for an assault alleged to have been committed by the plaintiff on the defendant; that claiming his residence in Indiana, for no other purpose than to sue the plaintiff, the defendant, on the 1st of May, in the year 1869, wickedly and maliciously, and without probable cause, and intending only to harass and vex the plaintiff, under color of legal process, did sue and cause to be instituted and filed in the Circuit Court of the United States within and for the district of Kentucky, held at Louisville, a declaration in his, the defendant's, name against the plaintiff and others, in which he alleged and stated that the plaintiff, on the —— day of ——, in the year 1868, with force and arms, entered his, the defendant's, house at midnight, and made an assault upon him, the defendant, beat him with sticks, &c., to his great damage, viz: the sum of $10,000. That the statements, such and all of them, in said declaration contained were false, and so known to the defendant at and before the bringing of the action; that the plaintiff was in no manner connected with said assault, if any such had been committed; and the defend-

ant, knowing this fact, maliciously and falsely, and without probable cause, made the false statements in said declaration contained, viz: *that the plaintiff assaulted, beat and bruised the defendant;* and claimed of plaintiff $10,000 in damages, when he knew, as plaintiff avers, that the plaintiff had not committed any of the wrongs complained of, or had any connection therewith; that the plaintiff in obedience to the process in said action, appeared in person and by counsel, and made defence, and at the October term of said court for that year a trial was had and a judgment, on defendant's own testimony, rendered for the plaintiff, and said action for the alleged assault, &c., was then and there finally ended and determined, by a verdict and judgment in favor of this plaintiff. By reason of the malicious institution of said action, and its malicious prosecution without any cause the plaintiff alleges that he expended large sums of money, other than the costs of the action allowed by law, in paying the expenses of himself and witnesses to and from Mercer county to Louisville while attending the trial, amounting to $——; also paid $—— attorney's fees to defend said action, and loss of time, &c., amounting in all the damages to $1500, &c.

Demurrers to the several petitions were sustained by the court below, and the plaintiffs (the appellants) appealed to this court.

T. C. Bell, Thompson & Thompson, C. A. & P. Hardin and *Bradley*, for appellants.

Kyle & Poston and *Van Winkle & Rodes*, for appellee.

The opinion of the court was delivered by

PRYOR, J.—The action instituted in the United States Circuit Court being a civil action, the sole question in these cases is, can an action for malicious prosecution, or rather an action on the case be maintained for the institution and prosecution, without probable cause, of a malicious and vexatious suit. The elementary books, in treating of the action for *malicious prosecution*, lay down the rule that there are three descriptions of damages, either of which is sufficient to support that action, and some one of them must appear or the action will fail: 1. To the person, by imprisonment. 2. To the reputation, by scandal. 3. To the property, by expense: 3 Cooley's Blackstone and notes 126; 2 Selwyn's Nisi Prius 252. This rule was evidently established after the enactment of the Statute of Marlebridge, giving to the defendant his costs in the

event the plaintiff was nonsuited or failed to recover; for, at common law, prior to that enactment, such actions could be maintained whether the property of the defendant was seized or not, or whether he had incurred expense in defending it; and regarding then, as now, the bringing of a civil action to be a *matter of right*, the plaintiff was liable in damages for the malicious institution and prosecution of such an action without probable cause. After the statute giving costs to the defendant, it was held by the common law courts that no action could be maintained on account of the institution and prosecution of a civil action without probable cause, and therefore no action could lie for a vexatious ejectment. In all such cases the plaintiff must have gone beyond the proper remedy for the enforcement of his claim, such as procuring an illegal order of arrest, or requiring excessive bail, before the action could be maintained. This entire doctrine is based on the idea that the plaintiff bringing the action is sufficiently punished, and the defendant fully recompensed by the statute requiring the plaintiff to pay all the costs. We perceive no good reason for following this rule, and denying to the defendant a remedy when his damages exceed the ordinary costs of the action. The fact that a plaintiff has been subjected to the payment of costs *pro falso clamore*, is no recompense to the defendant when the latter has, by reason of the malicious proceedings on the part of the plaintiff, sustained damage. In cases where the plaintiff has mistaken his action, or been nonsuited, or where by reason of some imaginary claim, he has seen proper to sue the defendant, it is not pretended that any action for damages can be maintained; but where the claim is not only false, but the action is prompted alone by malice and without any probable cause, the defendant's right of recovery, for the expenses incurred and damages sustained, should be as fully recognised as if his property had been attached or his body taken charge of by the sheriff. While the damages may be less in the one case than the other, the legal right exists, and some remedy should be afforded. If the facts alleged in these petitions are true, and they must be so treated on demurrer, it would be a singular system of jurisprudence that would admit the wrong and still withhold the remedy. If the defendant in these cases, at the time he left Kentucky and claimed his residence in Indiana, had a cause of action against the plaintiffs, or any probable grounds for believing that a cause of action existed, he had the right to select the forum in which to prosecute.

it, and in such a case his removal from one jurisdiction to another, if for the avowed purpose of bringing the action, is not to be regarded as evidence of a want of probable cause. Having a cause of action or a probable cause for bringing it, he had the right to institute proceedings in any court having jurisdiction. It must appear that the action was founded in malice, instituted without probable cause, and that the plaintiff has been damaged. When the reputation has not been assailed, or the defendant imprisoned, or his property seized, or its use prevented, the damages should be confined to the loss of time, and the reasonable expenses incurred in the defence of the action beyond the ordinary costs.

In these cases it is alleged that the plaintiffs, by reason of the prosecution of the actions against them, were compelled to pay large sums of money as fees to counsel, expenses of witnesses, &c. These items of expenses and the loss of time in the necessary defence of the action, all enter into the question of damages, and from the facts admitted by the demurrer, resulted alone from the malice of the defendant in the prosecution of an action when he knew he had no claim against them.

In the case of *Closson* v. *Staples*, 42 Vt. 209, it was held, "that when a civil suit was commenced and prosecuted maliciously and without probable cause, and is terminated in favor of the defendant, the latter may recover the damages sustained by him, and it is not material whether the suit was commenced by process of attachment or by summons only." In *Waterer* v. *Freeman*, cited in Esp. Dig. 527, "If a man sue me in a civil suit, yet if his suit be utterly without ground, and that certainly known to himself, I may have an action against him for the damages he putteth me to by his ill practice." In the case of *Whipple* v. *Fuller*, 11 Conn. 581, an action was instituted under a statute to prevent vexatious suits, to which was added a count at common law for the malicious prosecution of the vexatious civil action. The court in that case, by CHURCH, Justice, in discussing the effect of the statute and the right of recovery by the plaintiff, said, "But we wish to place our decision of this question upon broader principles," &c., and quoting from BAYLEY, Justice, in the case of *Elza* v. *Smith*, 2 Chit. 304, "If a party falsely and maliciously and without probable cause put the law in motion, that is properly the subject of an action on the case," and resuming, said: "We think therefore, upon the fundamental principles and analogies of the common law, that the second

count in the declaration is good." Hilliard on Torts, vol. 1, p. 443, says, "But the qualified custom is now well settled in relation to civil actions (corresponding with the rule as to criminal prosecutions) that no action lies to recover damages sustained by being sued in a civil action, *unless* it was malicious and without probable cause."

The application of this rule is restricted by the cases cited in support of it, by confining the right to maintain the action to civil actions where the party is maliciously held to bail, or where he has been mulcted for a larger sum than is claimed in the action, or where his property has been wrongfully attached; when, in fact, the party may have sustained greater loss by the prosecution maliciously of a vexatious suit, than the mere temporary seizure of his property. It is said, however, in the text, that the action lies for suing the defendant maliciously, and arresting him when the court had no jurisdiction, *or for suing in a proper court, but proceeding there vexatiously.* Following the doctrine of the common law, *that for every injury there is a remedy*, we see no reason for denying a remedy to the plaintiffs in each of these cases; and where a party seeks a judicial tribunal for the purpose alone of gratifying his malice, he should be made to recompense the party injured for the damages actually sustained, and the courts should see that a remedy is afforded for that purpose.

The judgments of the court below are therefore reversed, and the causes remanded, with directions to overrule the demurrers, and for further proceedings not inconsistent with this opinion.

Upon the institution of a civil suit at common law, it was formerly necessary for the plaintiff to furnish two or more responsible persons as his pledges, in order to secure the prosecution of the action, and to prevent the court from being imposed upon by malicious and groundless litigations. Under this system, in the event of a nonsuit or upon a default, the plaintiff and his pledges were regularly amerced, as the penalty for their improper invasion of a court of justice, and the amercement duly went to the king as a well-recognised branch of the royal revenue. There does not seem, however, to have been any general provision by which costs were secured to an innocent defendant, until the 23 Hen. VIII. ch. 15, for it must be borne in mind that the Statute of Marlebridge, ch. 6, only allowed costs in that special instance, where a tenant had been maliciously impleaded by his lord, upon a false charge of having collusively enfeoffed the heir within age in order to defraud the lord of his wardship. This early statute of Hen. VIII., has been still further extended by subsequent legislative enactments, and, the system of amercements having long since fallen into disuse, it would now seem that the plaintiff is almost universally liable for costs, whenever he may chance to fail in his suit. (Hargrave's note to Co.

Litt. 161, a.; Bac. Abr. *Costs*, d.) As amercements were originally imposed for the protection of the public, rather than for the security of the individual defendant, it would necessarily seem to follow that prior to these statutory provisions for costs, no man was secured from the consequences of a groundless and malicious suit, unless he could recover in damages for the injury he had sustained. Indeed no less an authority than Chitty has ventured to suggest that a defendant, in such case, could, at that time, have always had his suit at law. "It seems," he says, "before the statutes entitling the defendant in civil actions to costs, if the suit terminated in his favor, he might support an action against the plaintiff, if the proceeding *was malicious and without probable cause*:" (3 Chit. Bla. 126, n.) Among the cases cited, to sustain this view, is that of *Waterer* v. *Freeman*, Hobart 205–266, where an action on the case was held to lie against the original plaintiff, because he had resorted to a second execution before the first had been exhausted. Said HOBART, C. J., "If a man sue me in a proper court, yet if his suit be utterly without ground of truth, and that certainly known to himself, I may have an action of the case against him for the undue vexation and damage that he putteth me unto by his ill practice, though the suit itself be legal." Another case, also cited, is that of *Atwood* v. *Munger*, Style 378, wherein ROLLE, C. J., says: ".I hold that an action upon the case will lie for maliciously bringing an action against one, when he had no probable cause; and, if such actions are used to be brought, it would deter men from such malicious courses as are too often put in practice." In neither of these cases, however, did the facts involved seem to call for the application of the principles therein expressed; and it was said, to the contrary, by Lord CAMDEN, in *Goslin* v. *Wilcock*, 2 Wilson 302, that "there are no old cases in the old books of actions for suing where the plaintiff had no cause of action." Nevertheless Hargrave seems to have come to a very similar conclusion upon the subject, for Coke having declared, in his commentary upon Littleton (Co. Litt. 161, a,), "that a man shall not be punished for suing of writs in the king's courts, be it right or wrong;" the learned editor sought to qualify the rule thus laid down by the text in the following terms: "There is also a remedy for a false and malicious prosecution, though the aggravation of a conspiracy or confederacy is wanting, and the injury comes from one only; for, in such a case, the party prosecuted may have an action upon the case for damages. I apprehend, too, that such action lies, as well where the vexation is practised by a civil suit, as where it is carried on through the medium of a criminal process. Indeed the numerous cases to be met with in the books are chiefly for criminal prosecutions. But there seems to be no reason for distinguishing between the writ of conspiracy and an action upon the case in this respect; and exclusively of other authorities which may probably be found on search, Lord HOBART, Mr. Sergeant ROLLE, and Lord HOLT, all concur in the idea that where a civil suit is commenced falsely and maliciously, and for the mere purpose of vexation, it is actionable." It would seem, however, that this language of the learned annotator was not considered "quite accurate" by WILLIAMS, J., when cited in argument in the Court of Common Pleas: *Cotterell* v. *Jones*, 11 Com. Bench 722; s. c. 73 Eng. Com. Law 722. And in *Potts* v. *Imlay*, 1 Southard (N. J.) 322, which was an action on the case for the malicious prosecution of a civil suit without probable cause, where neither the person of the defendant had been arrested, nor his property attached, the bearing and weight of the prior adjudications was

determined by KIRKPATRICK, C. J., in the following terms: "The books have been searched for four hundred years back, and upon that search it is conceded even by the counsel for the plaintiff below, himself, that no case can be found in which this action has been maintained, in circumstances similar to the present. It is true that there are general expressions made use of by some of the annotators, which might seem at first view, to embrace the case, as Hargrave's Note, *supra*, and some others; so also in some of the reporters; but these general expressions, by fair rules of construction, are to be limited, and compared with the adjudged cases themselves, and not to be carried beyond them. With such limitations, of which too they will very fairly admit, they are perfectly consistent with general principles; but without it they are not law."

While then there seems upon the one hand to be a want of any direct decision going to the extent that an action would lie for the malicious prosecution of a civil suit prior to the statutory provisions in relation to costs, so upon the other there are certainly not lacking some very respectable authorities, which appear to most positively negative this view of the ancient common law. Thus in an old case determined in the time of Henry VII., and reported in Dyer 285 a, it was said, upon an action of *scandalum magnatum* for a writ of forger of false deeds, which was then still pending, that, "no punishment was ever appointed for a suit in law, however it be false and for vexation." And so in *Parker* v. *Langley*, Gilbert's Cases 161, it was said: "The applying in a civil action to a court of justice for satisfaction or redress, has been so much favored, that no action has ever been allowed against a plaintiff for such suit singly and directly on pretence of its being *false and malicious*."

Whatever difference of opinion may exist as to the extent of the defendant's remedy in former times at common law, upon being maliciously involved in the defence of a groundless suit, there does not seem to be any question, in England at least, but that the statutes entailing costs upon the unsuccessful plaintiff now furnish ample compensation to the defendant for any injury he may have sustained in such a case.

"Since the stat. 4 Jac. 1, ch. 3," says Chitty, in concluding the note already cited, "which gives costs to a defendant in all actions, in case of a nonsuit or verdict against the plaintiff, and other statutes giving costs to defendants in other stages of the cause, it seems that no action can be supported merely in respect of a civil suit maliciously instituted, except in some cases under particular legislative provisions," *supra*.

And so in the Digest of Swift, vol. 1, p. 492, it is laid down as being "well settled, that at common law, no action will lie against one for bringing a civil suit, however malicious and unfounded, unless the body of the party is imprisoned, or holden to bail; in all other cases, the costs the party recovers are supposed to be an adequate compensation for the damage he sustains." See also, *Savill* v. *Roberts*, 12 Mod. 208, and *Parton* v. *Honnor*, 1 Bos. & Pul. *205, to the same effect. Said TALFOURD, J., in the case of *Cotterell* v. *Jones*, 11 Com. Bench 730; s. c. Eng. Com. Law Rep. 730, "It appears from the whole current of authorities, that an action of this description, if maintainable at all, is only maintainable in respect of legal damage actually sustained; and that the mere expenditure of money by the plaintiff in the defence of the action brought against him does not constitute such legal damage; but that the only measure of damage is, the costs ascertained by the usual course of law." This seemingly well-established understanding of the law, so frequently reiterated in the English courts of justice, does not appear to have been

successfully questioned in the earlier American cases: *Potts* v. *Imlay*, *supra*; *VanDuzor* v. *Linderman*, 10 Johns. 106; *Kramer* v. *Stock*, 10 Watts 115; *Tomlinson* v. *Warner*, 9 Ohio 104; *Ray* v. *Law*, 1 Pet. C. C. 207–210; *Allgor* v. *Stillwell*, 1 Halst. 166; *Munns* v. *Dupont et al.*, 1 Am. Lead. Cas. *210.

In *Potts* v. *Imlay*, *supra*, determined by the Supreme Court of New Jersey in 1816, the English rule was forcibly sustained by Chief Justice KIRKPATRICK, in the following language: "Formerly the amercement, now the costs are the only penalty the law has given against a plaintiff for prosecuting a suit in a court of justice, in the regular and ordinary way, even though he fail in such prosecution. The courts of law are open to every citizen, and he may sue *toties quoties* upon the penalty of lawful costs only. These are considered as a sufficient compensation for the *mere* expenses of the defendant in his defence. They are given to him for this purpose and he cannot rise up in a court of justice and say the legislature have not given him enough. If we were legislators, indeed, perhaps we should be inclined to say that the costs, in all cases where costs are given, should completely indemnify the party for all his necessary expenses, both of time and money; but those to whom this high trust is committed, in this state, have thought and we will presume, have wisely thought otherwise. In England, it is believed the costs are in some measure discretionary with the court, and are apportioned to the circumstances of the case, but here it is not so. They are fixed by statute, they can neither be increased nor diminished, but, *ceteris paribus*, are precisely the same in all cases.

Perhaps a greater latitude given to the courts of justice, might in some degree alleviate the hardship now complained of. Besides, if we go to the very equity of the thing, which seems to be the ground of argument here taken, the same reasoning which is here used to prove that the defendant ought to have damages upon a false claim, would also prove that the plaintiff ought to have damages upon a false plea. He is put to all the expense of a trial upon such plea, and yet he can recover nothing therefor but his lawful costs; though surely all experience teaches us that the plea of the defendant is not less frequently false than the claim of the plaintiff. But to what excesses would this lead us? where would litigation end? The truth is, that merely for the expenses of a civil suit, however malicious and however groundless, this action does not lie, nor ever did, so far as I can find, at any period of our judicial history. It must be attended, besides ordinary expenses, with other special grievance or damage not necessarily incident to a defence, but superadded to it by the malice and contrivance of the plaintiff; and of these an arrest seems the only one spoken of in our books."

In this case much stress seems to have been laid upon the fact that the malicious prosecution had been instituted before a justice of the peace, where the costs imposed were merely nominal; but this consideration did not prevail with the court. Said SOUTHARD, J., "It is not unlikely that some of the inconveniences which have been mentioned at the bar, will result from the doctrine now established, in the court for the trial of small causes. Unprincipled men are often to be found in every society, who, for the sole purpose of vexing and harassing a neighbor, whom they dislike, will bring many malicious suits, if the only evil they are to suffer is the payment of the costs in that court. But the contrary doctrine would lead to consequences not less unpleasant; and if this were not so, we cannot here remedy the evil. By enlarging the jurisdiction of judges, and giving almost nominal costs, the legislature have offered temptations to

the malignant, to bring vexatious suits. Higher costs would repress this feeling. It is only in that court that such suits are heard of. But the law I conceive to be clear; and, if remedy be necessary, it must come from a different authority from this court.

In *Pangburn* v. *Bull*, 1 Wend. 345, however, which was also a malicious suit without probable cause before a justice of the peace, this circumstance was deemed sufficient to distinguish the case from the English authorities, and an action upon the case was held to lie for the expenses and inconveniences incurred in defence of the suit, in view of the gross inadequacy of the costs allowed by statute. Said the court: "When it is considered that malice and the want of probable cause are the foundation of the action, it would seem, on principle, to reach cases where the injury would be equally great, although the proceeding did not require an arrest or bail." In *Whipple* v. *Fuller*, 11 Conn. 582, there seems to have been shown a still further tendency to depart from the English rule. But there the declaration was held bad for a misjoinder, and the case itself was distinguishable upon the well recognised ground that there had been a malicious attachment in the original unfounded suit. Nevertheless the court takes occasion therein to say, "that taxable costs afford a very partial and inadequate remuneration for the necessary expenses of defending an unfounded suit," and therefore seemed inclined to take the position that in all such cases the plaintiff should have his action, upon the broad principle that no wrong should be without a remedy.

Very much in the same direction is the comparatively recent case of *Closson* v. *Staples*, 42 Vt. 209, considered by the Supreme Court of Vermont in 1869. In that case the court below declined to charge that the action could not be maintained without the plaintiff had been arrested or his property attached, in the alleged malicious civil suit. The Supreme Court sustained this ruling. Said WILSON, J., "Where the action is brought and prosecuted maliciously and without reasonable or probable cause, the plaintiff asserts no claim in respect to which he had any right to invoke the aid of the law. In such case the plaintiff, by an abuse of legal process, unjustly subjects the defendant to damages which are not fully compensated by the costs he recovers. The plaintiff in such case has no legal or equitable right to claim that the rule of law, which allows a suit to be brought and prosecuted in good faith, without liability of the plaintiff to pay the defendant damages, except by way and to the extent of the taxable costs only, if judgment be rendered in his favor, should extend to a cause where the suit was maliciously prosecuted without probable cause. But where the damages, sustained by the defendant in defending a suit maliciously prosecuted without reasonable or probable cause, exceed the costs obtained by him, he has, and of right should have, a remedy by action on the case. * * * It would be inconsistent with our system of jurisprudence in the legitimate use of legal process to allow in all cases such costs as would cover all damages the defendant might sustain by defending a suit, without regard to the motive which influenced the plaintiff in commencing and prosecuting it. And it is quite obvious, I think, that a provision by law, by which the court would have a discretionary power to tax and allow the defendant to recover in a malicious and unfounded suit, such costs by way of damages sustained in the defence of the suit as in their judgment he was entitled to, could not be made without infringing the rights of the plaintiff in such action, because he would have the right of trial by jury of the question whether in the prosecution of the suit, in which costs

were to be taxed, malice and the want of probable cause concurred, and this question could not be tried in that original suit."

It should notwithstanding be noted that the court have here laid down a broader rule than the exigencies of the case seem to have required, for the suit seems to have been maliciously and intentionally brought in the name of a third party, who was wholly unable to pay the costs, and if the court had therefore determined otherwise, the defendant would have been entirely without redress.

It would therefore seem that the circumstances of the principal case have for the first time called for the application of that broader rule, indicated in the judicial dicta already cited; and in this sense it may perhaps be said that the decision in the principal case is a step beyond the limits of any former adjudication and finds no exact precedent in the records of the common law.

J. P. B.

United States Circuit Court. District of New Jersey.

WILLIAMS & ALBRIGHT *v.* THE EMPIRE TRANSPORTATION COMPANY AND B. W. HOPPER.

A plea to a bill of complaint alleging facts, which, if true, may show that one of the defendants has no interest in the suit, not overruled, but saved to the defendant to the hearing and then to be considered in the light of the evidence in the case.

The legislation of the state making provision for the service of process, a foreign corporation, transacting business there, may be estopped by such legislation from pleading that the corporation is not an inhabitant or is not found in the state for service of process.

A. Q. Keasbey, for complainants.

Geo. Harding, for defendant Hopper.

NIXON, District Judge.—This is a motion to strike out a plea. The bill of complaint was filed for the infringement of certain letters patent, against the Empire Transportation Company, a corporation organized under the laws of the state of Pennsylvania and doing business as such among other places, at Jersey City, and elsewhere within the state of New Jersey, and B. W. Hopper, the agent of said company, in this state.

The service of the subpœna was made upon the defendant, Hopper.

No appearance has been entered for the defendant corporation; but Hopper has appeared and pleaded that at the time of the commencement of the suit he was acting merely as station agent at Newark, New Jersey, for the Empire Transportation Company, a corporation organized and operating under the laws of Pennsyl-

vania; that as such agent he had nothing to do with the construction and operating of cars for transporting petroleum, nor with the running of the same, within the district of New Jersey, nor in any other place, his duty as station agent being merely to keep the books of the company, to collect the amounts due for freights received and shipped, and to make returns for the same to the office of the company at Philadelphia.

By the consent of parties, the motion to strike out the plea has been treated as a demurrer, under the rules. The facts stated are admitted to be true, and the question is whether they constitute a sufficient reason why the said Hopper should not have been included, as a defendant in the suit.

The plea, although not common, is one well known in equity practice. It is sometimes called a plea in abatement and sometimes a plea in bar. A defendant is permitted to plead that he does not sustain the character, which he is alleged to bear in the bill, or that he has no interest in the subject of the suit: Story's Eq. Pl., §§ 732, 734, n.

I am quite sure that the plea ought not to be overruled. The facts stated may be a defence. The only doubt I have, is, whether I should save to the defendant the benefit of the plea to the hearing, or order it to stand for an answer. But, upon the whole, I think the former course is the true one, because so far as it appears to the court, it may prove to be a defence. Matters may be disclosed in the evidence which will establish or avoid it, and no course should now be taken that will preclude the consideration of the question hereafter. The plea is, therefore, saved to the hearing, and to be then treated as the testimony will warrant.

But, I infer, from the tenor of the argument of the counsel, when the case was before the court, that this is not the question which in fact the parties are endeavoring to have decided. They are reaching after a different matter. They wish to ascertain, if the proceedings should be discontinued against the defendant, Hopper, for want of interest, whether the suit is still maintainable against the Empire Transportation Company, a foreign corporation, in view of the provisions of the 88th section of the "Act concerning corporations," approved by the legislature of New Jersey, April 7th 1875 (Rev. of 1877, p. 193), and also of the 1st section of the Act of the Congress of the United States, entitled, "An act to determine the jurisdiction of the Circuit Courts," &c., approved March 3d

1875 (18 Stat. 470). The state law referred to enacts, "that in all personal suits or actions hereafter brought in any court of this state, against any foreign corporation not holding its charter under the laws of this state, process may be served upon any officer, director, agent, clerk or engineer of such corporation, either personally, or by leaving a copy at their dwelling-house or usual place of abode, or by leaving a copy at the office, depot, or usual place of business of such foreign corporation." The Act of Congress provides, "that no civil suits shall be brought before either of said courts (Circuit or District), against any person by any original process or proceeding, in any other district than that whereof he is an inhabitant, or in which he shall be found, at the time of serving such process, or commencing such proceeding."

The corporation was not an inhabitant of the state of New Jersey, at the time of filing the bill and serving the subpœna. It has long been settled that the body corporate only lives within the boundaries of the sovereignty by which it is created: *Bank of Augusta* v. *Earl*, 13 Pet. 520; *Railroad Co.* v. *Wheeler*, 1 Black 286. This results from the fact that it is an artificial being, deriving its life from its charter, and has no capacity to exist, and no power to exercise its functions, except as they are conferred by the local law.

It would seem to be a legitimate if not necessary inference from this, that a corporation could not be *found* to be served with process outside of the place of its creation. Such was the opinion of the late learned Justice of the Second District (NELSON) in the case of *Day* v. *The India Rubber Co.*, 1 Blatch. 628, in which he quashed a writ of attachment and summons, that had been issued in the Circuit Court of the United States for the Southern District of New York, against a New Jersey corporation. And in the later case of *Pomeroy* v. *The N. Y. & N. Haven Railroad Co.*, 4 Blatch. 120, he went a step further and held, that the defendant corporation, organized in Connecticut, could not be found in New York, in the sense of being amenable to federal process, although the legislature of the state of New York, in authorizing the body-corporate to purchase lands, to enter into contracts and to extend its road into and over the state, had expressly provided, that it should be liable to be sued by summons in the same manner as corporations created by the laws of the state, and that the process might be served on an officer or agent of the company. He says (p. 122),

"The difficulty here is, in giving effect to this law of New York, providing for service of process on the defendants. That is regulated, as to this court, by the Act of Congress of 1789, already referred to, and cannot be altered or modified by any state law. According to that act, the defendant must be an inhabitant of the district or be served with process within it, in order to give the court jurisdiction. Now, service of process by the assent of this company, upon an agent within the state, cannot be said to be service upon an inhabitant of the district or upon a person within it. The corporation is still a Connecticut company resident within the state of Connecticut, but consenting to be sued in New York by service of process upon its agent; and, however effectual this service may be, in conferring jurisdiction over the company, upon tribunals governed by the laws of New York, it cannot have that effect in respect to federal tribunals, which are not only not governed by the state laws, but are governed by the Act of Congress, which has prescribed a different rule."

But the Supreme Court have given a different construction to the act and of course have come to a different conclusion.

Since the recent case of *Ex parte Schollenberger*, 6 Otto 369, it would seem that the court should look to the legislation of the state, and exercise jurisdiction over a foreign corporation, when provision has been made by state law, for service of the process. That action was one of a large number instituted in the Circuit Court of the United States for the Eastern District of Pennsylvania, by a citizen of that state against a foreign fire insurance company, which corporation had been allowed to transact its business in Pennsylvania by a law of the state, upon certain terms, one of which was, that a person should be designated upon whom a service of summons could be made, in case of suit against them. The Circuit Court dismissed the case for want of jurisdiction, and because the law of the state could not confer it; but the Supreme Court, after long argument and careful consideration, issued a mandamus directing the Circuit Court to reinstate the suits and proceed to trial, holding that a foreign corporation, transacting business in Pennsylvania, in view of the legislation of the state, was *found* there for the purpose of service of the writ. As the last utterance of the highest tribunal, this must now be accepted as the law, and it is instructive to review the steps by which the court reached the result.

In the *Bank of Augusta* v. *Earl, supra*, it was held, that a corporation might be deemed to have an existence beyond the place of its creation, to the extent of making contracts, which the courts would enforce.

In *The Lafayette Ins. Co.* v. *French*, 18 How. 404, the question was, whether the federal tribunals would acknowledge the validity of a judgment, obtained in the courts of the state, against a foreign corporation, when the state law authorized the corporation to carry on business within the state only on the condition that service of process on the agent should be considered and taken as service upon the corporation itself.

The court held, that the state had the right to impose such a condition, in regard to suits before its own tribunals, and that when the corporation sent its agent into the state to effect insurances, it must be presumed to have assented to the rule.

In *Railroad Co.* v. *Harris*, 12 Wall. 65, a suit was brought in the Supreme Court of the District of Columbia, against the Baltimore & Ohio Railroad Company, for injuries received from a collision on the road in the state of Virginia. The company received its charter from the state of Maryland. Authority was given by the legislature of the state of Virginia to extend the road into that Commonwealth, clothing the company with all the rights and privileges granted, and subjecting it to all the obligations and penalties imposed by the original Maryland charter. Congress subsequently passed an act, authorizing the extension of a lateral road into the District of Columbia, and conferring upon the company the right to exercise the same powers and privileges and imposing upon them the same restrictions, in the construction of the said lateral road within the district as they might exercise or be subject to, under and by virtue of the Act of Incorporation of the state of Maryland. After argument and re-argument, the court held that no new corporations were created by this legislation in the state of Virginia, or in the district; that the old corporation remained unchanged in its unity, but with the sphere of its operations greatly enlarged; and that although foreign and incapable of migration from Maryland, it might, nevertheless, be *found* in the District of Columbia, exercising its functions and authority upon such conditions as were prescribed by the Act of Congress. "One of these conditions may be," says Mr. Justice SWAYNE, speaking for the whole court, "that it shall consent to be sued there. If it do busi-

ness there, it will be presumed to have assented, and will be bound accordingly."

This decision was referred to with approbation by the court, in the subsequent case of the *Railroad Co.* v. *Whittier*, 13 Wall. 284.

It will be observed, from an inspection of these cases, that it is nowhere asserted that jurisdiction can be conferred upon the federal courts by the legislation of the state. Indeed, such an inference is expressly repudiated in the Pennsylvania Insurance Cases, *Ex parte Schollenberger*, *supra*, where the court say: "States cannot, by their legislation, confer jurisdiction on the courts of the United States; neither can consent of parties give jurisdiction, when the facts do not; but both state legislation and consent of parties may bring about a state of facts which will authorize the courts of the United States to take cognisance of a case." See *Ex parte McNeill*, 13 Wall. 243.

It would, perhaps, more nearly accord with the principle announced in these insurance cases to say that, by the legislation of a state, foreign corporations, doing business in the state, may be estopped from setting up, in bar of a suit in the federal courts, that they are not amenable to the jurisdiction

But whether this may be the meaning of the decision or not, I am constrained by the authority of these cases in the Supreme Court, to hold that the jurisdiction of the court over the present suit is not to be defeated because the defendant corporation was organized under the laws of a sister state. It was transacting business here, and by the provisions of the local law (Rev. of 1877, 193), it is subject to process, by serving the same upon one of its agents, and has waived its right to question the legality of such a mode of service.

Supreme Court of Indiana.

AVERY A. COLE *v.* MERCHANTS' BANK OF WATERTOWN.

The contracts of a maker and a guarantor of commercial paper are separate and distinct and cannot be joined as one cause of action against both.

Whether a contract of guaranty in general is assignable at common law, it is the better doctrine that a guaranty written on a negotiable note or bill addressed to no particular person partakes of the negotiable quality of the note, and passes as an incident to it, to every *bona fide* holder for value of the note.

Independently of this doctrine, a guaranty is assignable in equity, and under the code of Indiana, the assignee may sue upon it in his own name.

THIS was a suit by the appellee, as endorser of the Davis Sewing Machine Company against Avery A. Cole, Leonidas A. Cole, and Nathaniel Pierce, upon the following promissory note and guaranty:

"$1250. "Logansport, Ind., December 10th 1873.

"Six months after date I promise to pay to the order of the Davis Sewing Machine Company, twelve hundred and fifty dollars, payable at the Peoples' Bank, Logansport, Ind., for value received, with ten per cent. interest, without any relief whatever from valuation or appraisement laws, and with ten per cent. fees if collected by attorney. Drawer and endorsers jointly and severally waive presentment for payment, protest, and notice of protest and non-payment of this note. No credit allowed on this note unless endorsed on back by the payee. A. A. COLE."

On the back were the following endorsements: "We jointly or severally for value received hereby guarantee the prompt payment of the within note. L. A. COLE,
NATHANIEL PIERCE."

"Pay to the order of Merchants' Bank of Watertown, New York.
"Davis Sewing Machine Company, of Watertown, N. Y.
L. A. JOHNSON, Treasurer."

The complaint was in three paragraphs. The first set forth the note, the guaranty and endorsement; averred that the guarantors had due notice of its non-payment, &c., and prayed judgment against the maker and guarantors. The second paragraph was substantially like the first. The third was against the maker and guarantors as joint makers.

Upon appearing to the action, A. A. Cole filed a plea to the jurisdiction of the court over his person. L. A. Cole and Pierce filed a demurrer to each paragraph of the complaint, assigning for causes of demurrer to each paragraph that it did not state facts sufficient to constitute a cause of action; that there was a defect of parties defendant, and that the plaintiff (appellee) had not legal capacity to sue.

These demurrers were overruled by the court, and exceptions reserved.

A demurrer was sustained to the answer of want of jurisdiction by A. A. Cole, and he excepted.

He then answered in general denial.

The defendants, L. A. Cole and Nathaniel Pierce, the guarantors, answered:

1. That the plaintiff is not, and that the Davis Sewing Machine Company is, the real owner of the note sued on.

2. That the plaintiff is not the real party in interest, for the reason that the note was endorsed to it without consideration, simply for collection, and the consideration of said guaranty had wholly failed, setting out the particulars.

3. That by the guaranty on said note they did not intend to become joint makers or endorsers of said note, as the plaintiff well knew, and that the contract of guaranty upon said note was a separate, independent agreement, which did not pass to the plaintiff by the endorsement of the note, and that it had not been endorsed to the plaintiff.

The plaintiff demurred severally to the first and third paragraphs of answer of the guarantors, and moved to strike from the second, the allegations that the plaintiff was not the real party in interest, and that the note was endorsed for collection merely. The court sustained the demurrers to the first and third paragraphs of answer, and overruled the motion to strike out parts of the second.

Exceptions were reserved. The guarantors filed an amended first paragraph of answer, to which a demurrer was overruled.

Reply in denial. Trial by the court, joint judgment, over a motion for a new trial, for the plaintiff against all the defendants.

M. K. Farrand, *J. A. Traver* and *L. A. Cole*, for appellants.

James Bradley and *Samuel E. Williams*, for appellee.

The opinion of the court was delivered by

PERKINS, J.—We proceed to the consideration and decision of such questions, arising in this cause, as may be necessary to its determination.

It is manifest that L. A. Cole and Nathaniel Pierce were guarantors upon the note: *Sample* v. *Martin*, 46 Ind. 226. If they could not properly be jointly sued with the maker then the court erred in sustaining the demurrer to the answer of A. A. Cole, the maker, as he was not a resident of the county in which the suit was brought, a fact he answered to the jurisdiction of the court. Acts of 1875, p. 119.

The contracts of the maker and guarantors of the note were separate and distinct contracts. They were not a joint cause of action and the maker and guarantors could not properly be jointly sued. This is settled law in Indiana: *Richwine* v. *Scoville*, 54 Ind. 150, and cases cited; *Dickerson* v. *Coulter*, 45 Id. 447. There was, therefore, a misjoinder of causes of action and of parties defendant, but there was no demurrer to the complaint on either of these grounds. There was a demurrer for a defect of parties, in this, that the Davis Sewing Machine Company ought to have been made a party to answer to its interest.

Want of facts to constitute a cause of action was also made a ground of demurrer by the guarantors, but there was a good cause of action against them. The guaranty was duly assigned to the plaintiff; notice of the default of the maker had been given; the liability of the guarantors was fixed, and all this was shown in the complaint. The question is made whether the contract of guaranty is assignable, and whether if so, that in this case had been assigned.

We are satisfied that the contract of guaranty in this case was assignable, and passed with the note on which it was written, by the endorsement of the Davis Sewing Machine Company, to the Merchants' Bank of Watertown, New York. See *Studabaker* v. *Cody*, 54 Ind. 586. As the note and guaranty were duly transferred by written endorsement to the bank, the plaintiff in this suit, it was not necessary that the assignor should be made a party to answer to its interest: 2 R. S. 1876, p. 35, sect. 6. The endorsement also passed the legal title to the note and guaranty, to the plaintiff, making it at least *prima facie*, the real party in interest. The name of the plaintiff *prima facie* imports a corporation, and the complaint was sufficient: *Harris* v. *The Muskingum, &c., Co.*, 4 Blackf. 267. We think the guarantors were not discharged by delay in giving notice: *Sample* v. *Martin*, *supra*; 2 Pars. on Cont. 28, 29.

On the evidence, we cannot say the court erred in overruling the motion for a new trial.

It was proved that the plaintiff was the real *bona fide* owner of the note for a valuable consideration; that a delay of fifty-one days may have occurred in giving notice to the guarantors of the non-payment of the note by the maker, but it is not shown that the guarantors were injured by the delay, that there was a consideration for the guaranty, which is not shown to have failed, &c.

The judgment is reversed with costs as to A. A. Cole, the maker of the note. It is affirmed with costs as to L. A. Cole and Nathaniel Pierce, the guarantors.

The following opinion on a petition for a rehearing of the foregoing opinion was delivered by

PERKINS, J.—An earnest petition for a rehearing has been filed in this cause, in which it is insisted that a contract of guaranty is not assignable at common law. We concede that there is a conflict of authorities on this point. The form of the guaranty in this case will be noticed. It is addressed to no particular person. The endorsement transferring the paper is below the guaranty and is not limited to the note, but is in these words: "Pay to the order of Merchants' Bank, Watertown, New York." It is plain enough that this assignment was intended to transfer the note and guaranty —the entire instrument. The entire instrument was delivered to the assignee. While the general doctrine may be admitted to be that contracts of guaranty are not assignable at common law, yet there are authorities to the effect that a guaranty written upon a negotiable note or bill, addressed to no particular person, partakes of the negotiable quality of said bill or note, and that any person having the legal instrument takes in like manner the incident: *McLaren* v. *Watson*, 26 Wend. 425; *Cooper* v. *Dedrick*, 22 Barb. 516; *Webster* v. *Cobb*, 17 Ill. 459, and cases cited. This is regarded by Story and Daniel as the better doctrine: Story on Bills, 4th ed., sect. 458; Daniel on Negotiable Instruments, vol. 2, sect. 1777. Were it necessary to the decision of this case we should hold the same doctrine. But contracts of guaranty were assignable in equity though not at law: Story on Bills, sect. 657; *Averts* v. *The Commonwealth*, 20 Grattan 750. In Edwards on Bills and Notes 219, it is said that "a contract of guaranty, though endorsed upon a negotiable note, and drawn in general terms warranting its collection is not of itself negotiable, because the statute making promissory notes negotiable is not extended to any other instrument relating to the note."

This question arose in *The First National Bank* v. *Carpenter*, 41 Iowa 518, in which the court, after referring generally to the subject, disposes of the question in the case as follows: "But under our statute this and every other kind of contract is assignable and the assignee may sue thereon in his own name." So the

code of this state, which is similar to that of Iowa, has solved the controverted question for us. A contract of guaranty is assignable under our code: *Fletcher* v. *Pratt*, 7 Blackf. 522; *Patterson* v. *Crawford*, 12 Ind. 241; *Splahn* v. *Gillespie*, 48 Id. 397; *Horpen* v. *Pound*, 10 Id. 32.

No points were made as to joinder of causes of action or as to the parties to this appeal, or as to the jurisdiction over them of the court.

The petition for a rehearing is therefore overruled.

Supreme Court of Ohio.

A. J. HARNER v. LAWRENCE DIPPLE.

An undertaking by an infant as surety for the stay of execution is not void, but only voidable, and when ratified by him after arriving at majority, becomes a valid and enforceable contract.

MOTION for leave to file a petition in error to the District Court of Clarke county.

The original action was brought by Dipple against Harner, on an undertaking for stay of execution, executed by the defendant during his minority. It appears that the defendant arrived at his majority before the period of stay expired, and that after the expiration of the stay he acknowledged his liability, and promised the plaintiff, to whom the undertaking was made, to pay the amount of the judgment stayed. Upon this state of facts judgment was rendered for the plaintiff in the Court of Common Pleas, which judgment was afterward affirmed by the District Court.

To reverse these judgments leave is now asked to file a petition in error.

Spencer & Arthur, for the motion cited: 1 Parsons on Contracts 295; *Keane* v. *Boycott*, 2 H. Blackst. 511; Reeves' Domestic Relations 378 n.; 2 Kent's Com. 236; 1 Mason 32; Bingham on Infancy 23; Swan's Treatise 601–2; *Baker* v. *Lovitt*, 6 Mass. 78; *Oliver* v. *Hondlet*, 13 Id. 237; *Whitney* v. *Dutch*, 14 Id. 457; *Boston Bank* v. *Chamberlin*, 15 Id. 220; *Chandler* v. *McKinney*, 6 Mich. 217; *Dunton* v. *Brown*, 31 Id. 182; 11 S. & R. 305; Tyler on Inf. and Cor. 42, 48; 54 Penna. St. 380; Story on Contracts, sect. 57; 10 Ohio 127; 8 East 331.

Keifer & White, contra, cited Swain's Treatise 601; *Tucker* v *Moreland*, 10 Pet. 59; 1 Am. Lead. Ca. (5th ed.) 299, 300, 304, 306; *Cole* v. *Pennoyer*, 14 Ill. 160; *Curtin* v. *Patton*, 11 S. & R. 305, 310; *Hinely* v. *Margaritz*, 3 Barr 428; *Patchin* v. *Cromach*, 13 Vt. 330; Tyler on Inf. 56-7; Bing. on Inf. 43, 44; *Vaughn* v. *Darr*, 20 Ark. 600; *Shropshire* v. *Burns*, 46 Ala. 108; *Williams* v. *Moore*, 11 M. & W. 256; 1 Pars. on Con. (6th ed.) *328, 329 and note b; *Thornton* v. *Illingworth*, 9 Eng. C. L. 256; *Gibbs* v. *Morrill*, 3 Taunt. 307; *Mason* v. *Denison*, 15 *Wend.* 71; *Conroe* v. *Birdsall*, 1 Johns. Cases 127; *Ayers* v. *Hewitt*, 19 Me. 281; *Arnold* v. *Richmond Iron Works*, 1 Gray 434; 2 Kent 235, 247; *Roof* v. *Stafford*, 7 Cowen 185; *Slocum* v. *Harker*, 13 Barb. 537; 3 Burr. 1804; *Fonda* v. *Van Horne*, 15 Wend. 631; *Fetrow* v. *Wiseman*, 40 Ind. 148; *Kline* v. *Beebe*, 6 Conn. 494; *Owen* v. *Long*, 112 Mass. 403.

The opinion of the court was delivered by

McIlvaine, J.—The question made is, was the undertaking sued on absolutely void, or only voidable. If void, it was not subject to ratification: if voidable merely, it may be enforced after ratification.

Having considered this question upon principle, as well as upon authority, we are constrained to hold that the undertaking was voidable only, and that after ratification it became a valid and binding engagement.

In disposing of this case, we make no note of those principles which control cases where an infant, by reason of immaturity and natural incapacity, is, in fact, unable to assent to the terms of an alleged contract. When this undertaking was executed it contained every element of a valid contract, save only, that the party was under twenty-one years of age.

Except for necessaries, the law grants to infants immunity from liability on their contracts This immunity is intended for their protection against imposition and imprudence, and is continued after majority as a mere personal privilege. This privilege of immunity, after majority, is not given because of the actual or supposed incapacity of an infant to enter into contracts intelligently and prudently. If actual incapacity existed, the privilege of infancy would not be needed for the purpose of defence. And it is contrary to our knowledge of human nature, that all infants are incapable of intelligently and prudently entering into engagements

and assuming burdens. It is a matter of favor intended as a shield and compensation for the want of that greater wisdom and prudence which time and experience usually teach.

But, whatever may have been the natural capacity of the infant, whenever he arrives at majority, a time fixed by an arbitrary rule which, in the nature of things, can not affect the personal capabilities of its subject, the law presumes that he has acquired all the wisdom and prudence necessary for the proper management of his affairs; hence, the law imposes upon him full responsibility for all his acts and contracts.

In this new relation, it becomes his moral duty, and for its discharge he is invested with legal capacity to affirm and perform, or to disavow, at his election, all his previous contracts of imperfect obligation. Contracts for necessaries are of perfect obligation, and, therefore, he can not disaffirm them. Contracts founded on illegal considerations are of no obligation, and, therefore, may not be affirmed.

The appointment of an agent or attorney to make contracts is, perhaps, inconsistent and repugnant to the privilege of infancy, for the reason, among others that might be named, that it is imparting a power which the principal does not possess; that of performing valid acts, But, outside of these exceptions, which are based on special grounds, we see no reason why the power should be denied, to ratify any contract which, as an adult, he might originally make. The power of disaffirmance being co-extensive, it is all that is needed for his protection.

If, in the case before us, the ratification had been made by payment, instead of a promise to pay, its binding effect would not be doubted. Why, therefore, should not the promise to pay be binding also? There is no question about consideration. The consideration which supported the original promise is sufficient to support the ratifying promise. The only contention here is, that the original promise was void by reason of infancy, not for want of consideration. If, therefore, actual performance by payment would have been binding, so should the promise to perform; and this, too, without regard to the fact whether or not the infantile contract was beneficial or prejudicial. The principles of jurisprudence are not violated by the performance of a contract prejudicial to the party. Indeed, a person, *sui juris*, is as strongly obligated by his contracts prejudicial as by those beneficial to himself; and the same principle

should apply where a person, *sui juris*, ratifies and confirms his contract of infancy.

The plaintiff in error, however, relies chiefly on the authority of decided cases, and claims the settled law to be that all contracts of an infant prejudicial to him are absolutely void, and that a contract of suretyship is of that class.

In Swan's late treatise, among contracts of infants which have been decided to be void, is mentioned that of suretyship; but the author, in speaking of the state of the authorities, pithily and truthfully remarks: "What contracts of an infant are void, and what are merely voidable, nobody knows."

Keane v. *Boycott*, 2 H. Blackst. 511, decided in 1795, appears to be a leading case. The contract of an infant was held in that case to be voidable only; but in the opinion of Chief Justice EYRE a rule was stated wherein certain of such contracts are said to be void. The rule was thus stated: "When the court can pronounce the contract to be for the benefit of the infant, as for necessaries, it is good; when to his prejudice, it is void; and where the contract is of an uncertain nature as to benefit or prejudice, it is voidable only at the election of the infant." This rule, modified so as to declare that a contract *necessarily* prejudicial to the infant is void, has been adopted in many later cases, both in England and in this country. But the current of more recent decisions repudiates the distinction between void and voidable contracts on account of their beneficial or prejudicial nature, and holds them all to be voidable merely; and the more recent decisions of courts still adhering to the distinction, hold some contracts voidable only, which were before held to be void. Thus, in *Owen* v. *Long*, 112 Mass. 403, a surety contract was held to be voidable only, for the reason that such contract, as a matter of law, cannot be said to be necessarily prejudicial to the surety. Also, an account stated is held to be voidable only: *Williams* v. *Moor*, 11 M. & W. 255. Also, a conveyance by lease and release: *Zouch* v. *Parsons*, 3 Burr. 1794.

The following cases are to the effect that an infant's contract of suretyship is merely voidable, and may be ratified. They also show, with more or less force and directness, that the distinction between void and voidable contracts of infants, on the ground of benefit or prejudice, is not sound: *Curtin* v. *Patton*, 11 S. & R. 305; *Hinely* v. *Margaritz*, 3 Barr 428; *Gatchin* v. *Cromach*, 13 Ver. 330; *Vaughn* v. *Darr*, 20 Ark. 600; *Shropshire* v. *Burns*,

46 Ala. 108; *Williams* v. *Moor*, 11 M. & W. 256; *Fetrow* v. *Wiseman*, 40 Ind. 148; *Fonda* v. *Vanhorne*, 15 Wend. 631; *Scott* v. *Buchanan*, 2 Humph. 468; *Cole* v. *Pennoyer*, 14 Ill. 158; *Cummings* v. *Powell*, 8 Texas 80; 1 J. J. Marshall 236; *Mustard* v. *Wohlford's Heirs*, 15 Gratt. 329.

In Massachusetts, where the doctrine was approved that the acts of an infant are void, which not only apparently but necessarily operate to his prejudice (*Oliver* v. *Clop*, 13 Mass. 237), it was afterward said by Chief Justice PARKER, in *Whitney* v. *Dutch*, 14 Mass. 457: "Perhaps it may be assumed as a principle, that all simple contracts by infants, which are not founded on an illegal consideration, are strictly not void, but only voidable, and may be made good by ratification. They remain a legal *substratum* for a future assent, until avoided by the infant; and if, instead of avoiding, he confirm them when he has legal capacity to make a contract, they are, in all respects, like contracts made by adults." And in 1840 (*Reed* v. *Bachelder*, 1 Metc. 559), Chief Justice SHAW said: "The question, what acts of an infant are voidable and what void, is not very definitely settled by the authorities, but in general it may be said that the tendency of modern decisions is to consider them as voidable, and thus leave the infant to affirm or disaffirm them when he comes of age, as his own views of his interest may lead him to elect."

So that, Mr. Parsons, in his work on Contracts, vol. 1, p. 294, 6th ed., says: "The better opinion, however, as may be gathered from the later cases cited in our notes, seems to be that an infant's contracts are, none of them, or nearly none, absolutely void; that is, so far void that he cannot ratify them after he arrives at the age of legal majority."

In 1 American Leading Cases 300, 5th ed., it is said: "The numerous decisions which have been had in this country justify the settlement of the following definite rule as one that is subject to no exceptions. The only contract binding on an infant is the implied contract for necessaries. The only act which he is under a legal disability to perform is the appointment of an attorney. All other acts and contracts, executed or executory, are voidable or confirmable by him at his election," on arriving at majority. This rule has been quoted and approved in 14 Ill. 158, and 15 Gratt. 329, and we think it embodies the better reason.

In the light of principle, therefore, as well as by the weight of

the later authorities, the whole question should be thus resolved: The privilege of infancy is accorded for the protection of the infant from injury resulting from imposition by others or his own indiscretion. That object is fully accomplished by conferring on him the power to avoid his contracts, or, in other words, by giving him immunity from liability until such contracts are ratified by himself after arriving at full age. And, again, that an adult, laboring under no disability, may perform his unexecuted contracts of infancy, whether they be beneficial or prejudicial to him, and that he will be bound by such performance, we think is a proposition too plain to be doubted. If, therefore, with full knowledge of the facts, he ratifies and affirms them, being moved thereto by his own sense of right and duty, he should in law, as in morals, be bound to their performance. Motion overruled.

United States Circuit Court. District of Kentucky.

JONES, ASSIGNEE OF CHAS. H. CLIFTON, *v.* CHAS. H. CLIFTON AND NANNIE W. CLIFTON.

A settlement by a husband who is not in debt and not in contemplation of any new or unusual business ventures, of a part of his estate, not exceeding one-sixth of the whole, upon his wife, is valid and unimpeachable.

Such a settlement is not invalid because not made in due legal form by the intervention of a trustee. Where it is otherwise good, equity will not allow it to fail for mere want of an intervening trustee.

Nor is such settlement made invalid by the insertion of a power of revocation in the husband. Such a power has by the long-established practice in equity become a proper part of every deed of family settlement.

The exercise of the power of revocation in favor either of himself or of a stranger would terminate the separate estate of the wife and subject the property to the claims of the settlor's creditors.

But an assignment in bankruptcy by the settlor is not an exercise of the power of revocation, nor does it pass that power to his assignee.

Powers of revocation and appointment over property within a voluntary settlement, even though such as may be exercised by a bankrupt for his own benefit, do not pass by an assignment or an adjudication in bankruptcy; nor will equity compel the bankrupt to execute them for the benefit of the assignee.

ON the 3d of October 1872 the defendant, Charles H. Clifton, being then free from debt, and with a fortune probably exceeding $250,000, conveyed to his wife, without the intervention of a trustee, a small parcel of land, worth about $700, and assigned to her five policies of insurance on his life, each for $10,000, but at the time not worth more in the aggregate than $12,000.

On the 1st of April 1873, being still free from debt, and with his fortune very little diminished, he made another conveyance to his wife, also without the intervention of a trustee, of two parcels of land, one situated in the city of Louisville and the other in the county of Jefferson. The first parcel was, at the time of this conveyance, and still is, encumbered by mortgage to probably its full value. The other parcel was the homestead of the ancestors of the grantor, and was estimated to be worth $18,000. On this parcel he afterwards erected a dwelling-house which cost $8500.

By both deeds, and substantially in the same terms, the property was conveyed "to the said Nannie, to hold to her and her heirs for ever as her own separate estate, free from the control, use and benefit of her husband." By both deeds, and substantially in the same terms, power and authority were conferred on the grantee to appoint the parcels of land and each or all of them, or part or parts of each, as often as she might choose to exercise the same, to such uses as she might designate by joint deed with her husband, or by a writing in the form of and to take effect as a devise under the Statute of Wills of Kentucky, and by both deeds, in substantially the same terms, the grantor expressly reserved to himself power to revoke the grants in whole or in part, and to appoint to any such uses or persons as he might designate either by deed or last will. In default of appointment, or to the extent that the grantor might fail to appoint, each of said parcels of land was to remain to the grantee and her heirs for ever as her separate estate, with the powers conferred upon her as above stated.

On the 4th of December 1875, Clifton filed his voluntary petition in bankruptcy, and was adjudged bankrupt thereon, and the complainant, Stephen E. Jones, was appointed his assignee.

In October 1876 the assignee brought this suit in equity, in which he sought to have both of the above-mentioned deeds declared void, and thus the clouds removed from his alleged title to the parcels of land and policies of insurance mentioned therein.

B. H. Bristow and *Jas. A. Beattie*, for complainant.

Bijur & Davie, for defendants.

The opinion of the court was delivered by

BALLARD, Circuit Judge.—The bill proceeds on three grounds, all more or less connected, but still so distinct as to require a sepa-

rate statement: 1. That the making of the two instruments was a contrivance and scheme on the part of Charles H. Clifton to cheat, hinder and defraud his *future* creditors. 2. That the conveyances having been made by the husband to the wife, without the intervention of a trustee, are, because of this, and because of the reservations contained therein, especially the absolute power of revocation, void, and so passed no title or interest to the nominal grantee. 3. That by operation of the Bankruptcy Act, the property described in the instruments, or, at least, the powers of revocation therein reserved, passed to the complainant as assignee in bankruptcy.

I shall examine each of these grounds separately The complainant has offered no testimony whatever of the alleged fraudulent intent. He does not even allege that the grantor at the time the conveyances were executed owed anything. The uncontroverted proof is that he was then free from debt; that he was not then engaged in trade; that he did not contemplate engaging in trade or contracting debts; that he was an indiscreet young man, who, though possessed of a large fortune, might squander the whole in reckless gaming and dissipation; that the settlements were made at the suggestion of his more prudent wife, and did not embrace more than one-sixth of his estate. That Clifton might, under these circumstances, by *proper conveyances*, have settled on his wife this amount of property, free from all claims proceeding from his future creditors, or from his assignee in bankruptcy, is indisputable. The authorities everywhere sustain such settlements: *Sexton* v. *Wheaton and Wife*, 8 Wheat. 229; *Hinds, Lessee*, v. *Longworth*, 11 Id. 211–213; *Haskell* v. *Bakewell*, 10 B. Mon. 206; *Lloyd* v. *Fulton*, 91 U. S. 485; *Smith* v. *Vodges*, 92 Id. 183. Authorities to the same point might be multiplied indefinitely.

The learned counsel of complainant themselves do not dispute that such settlements are generally unimpeachable. Their contention is that the settlements in controversy here were not made by *proper* conveyances; that the conveyances being made by the husband to the wife without the intervention of a trustee are void in law, and that by reason of the powers of revocation reserved, they are void both in law and in equity.

It thus appears that the complainant does not now ask relief on the ground of the distinct fraud alleged. If he attaches any importance to the allegation of fraud contained in his bill, it is only

because he considers that a deed made by a husband to his wife, containing a reservation of an absolute power to revoke it, is *per se* fraudulent. Thus considered, the complainant's first ground becomes blended with the second, and one and the same with it. I proceed, therefore, to consider the second ground.

Under the common-law system the husband and wife are, for most purposes, regarded as one person. As a result of this legal unity, their contracts with each other, whether executory or executed, in parol or under seal, are void. This doctrine, it must be confessed, has little foundation in reason. It is wholly unknown in that enlightened system of jurisprudence, which, coming down to us from the ancient civilization, now prevails on the continent of Europe, and it has only a faint recognition in the system of equity jurisprudence, which in England and in this country has grown up by the side of the common law. In equity the husband and wife are for many purposes treated as two persons. Whilst at law all the personal property of the wife becomes on marriage the property of the husband, and the entire management and profits of her real estate pass to him, in equity she may not only own and manage her real and personal estate, but she may dispose of it free from the control of her husband. True, it was at one time doubted whether any interest in either real or personal property could be settled to the exclusive use of a married woman without the intervention of trustees, but for more than a century and a quarter it has been established in courts of equity that the intervention of trustees is not indispensable, "and that wherever * * * property * * * is settled upon a married woman, either before or after marriage, for her separate and exclusive use, without the intervention of trustees, the intention of the parties shall be effectuated in equity, and the wife's interest protected against the marital rights of her husband, and of his creditors also:" 2 Story's Eq. Jurisp., sect. 1380.

Nor is it at all material whether the settlement is made by a stranger or by the husband himself. In either case the trust will attach upon him, and will be enforced in equity. It is now universally held that a settlement made by a husband on his wife by direct conveyance to her will be enforced in the same manner and *under the same circumstances that* it will be when made by a stranger, or when made to a trustee for her exclusive use: *Shepard* v. *Shepard*, 7 Johns. Ch. 56; *Jones* v. *Obenchain*, 10 Gratt. 259; *Sims* v. *Rickets*, 35 Ind. 192; *Thompson* v. *Mills*, 39 Id. 532;

Putnam v. *Bicknell*, 18 Wis. 335; *Burdeno* v. *Amperse*, 14 Mich. 91; *Barron* v. *Barron*, 24 Vt. 398; *Marraman* v. *Marraman*, 4 Met. (Ky.) 84; *Wallingsford* v. *Allen*, 10 Pet. 594.

All voluntary conveyances, whether made wholly without consideration or upon the meritorious consideration of love and affection, are scrutinized and regarded with some suspicion in courts of equity when they are sought to be impeached by creditors. But I have been referred to no case, and I have found none, which hints that a reasonable settlement made by a husband, free from debt, on his wife, by direct conveyance to her, is any more impeachable than when it is made through the intervention of trustees. Settlements made in either mode, when uncontaminated by actual fraud, are unimpeachable by subsequent creditors.

It may be admitted that a power of revocation inserted in an assignment made by a debtor for the benefit of his creditors, would render such assignment constructively fraudulent, and therefore void: *Riggs* v. *Murray*, 2 Johns. Ch. 576; s. c. 15 Johns. 571; *Tarback* v. *Marbery et al.*, 2 Vern. 570; but such power of revocation has never been held to affect a family settlement. On the contrary, in the above case of *Riggs* v. *Murray*, Chancellor KENT expressly declares that "family settlements may often require such powers of revocation to meet the ever-varying interests of family connections." Moreover, it is the well-settled practice in England to insert such powers in such settlements, unless, indeed, the *sole* object of the *settlement* is to guard against the extravagance and imprudence of the settlor. Indeed, ever since Lord HARDWICKE'S time the failure of the conveyancer to insert a power of revocation in a deed of family settlement has been regarded as a strong badge of fraud: *Hugenin* v. *Basely*, 14 Ves. 273.

In some of the later cases such settlements have been annulled at the suit of the settlor, apparently on the sole ground that they did not contain a power of revocation.

In *Coutts* v. *Acworth*, Law Rep. 8 Eq. 558, it was held that "the party taking a benefit under a voluntary settlement * * * containing no power of revocation, has thrown upon him the burden of proving that there was a distinct intention on the part of the donor to make the gift irrevocable."

In *Wallaston* v. *Tribe*, Law Rep. 9 Eq. 44, the same rule is recognised and enforced.

In *Everett* v. *Everett*, Law Rep. 10 Eq. 405, the Chancellor,

in annulling a deed of settlement made by a young woman soon after she arrived at age, chiefly on the ground that it contained no power of revocation, says, in substance: "The sole object of the settlement being to protect the settlor and her children, if she married, had I been called on for advice I should have said: 'Have proper trustees, give her a voice in the selection of new trustees, and give her a power of revocation with the consent of the trustees.'"

In *Phillips* v. *Mullings*, Law Rep. 7 Ch. App. Cases 244, the Court of Appeal recognises the same general rule, but in that case refused to annul the settlement, though it contained no power of revocation, on the distinct ground that the settlement was made by a young man of improvident habits to guard against his own folly, and "the deed was explained to him and the particular clauses brought to his notice."

"Those who induce," said the Lord Chancellor, "a young man of this description to execute such a deed, are bound to show that the deed is in all respects proper, or, if the deed contains anything out of the way, that he understood and approved it. * * * It is not necessary to show that the usual clauses inserted by conveyancers were explained, but any unusual clauses must be shown to have been brought to his notice, explained and understood."

In *Hall* v. *Hall*, Law Rep. 14 Eq. 365, the Vice-Chancellor regarded the rule as so firmly settled, that he felt impelled to annul a settlement twenty years after its execution, simply because it did not contain a power of revocation. The same rule has been recognised and adopted in the United States: *Russell's Appeal*, 75 Penna. St. 269; *Garnsey* v. *Mundy*, 24 N. J. Eq. 243.

Some chancellors have intimated that a voluntary settlement partakes very much of the nature of a last will, and that it should be scarcely less revocable.

I feel much difficulty in yielding assent to the extreme doctrine announced in some of these cases, and I am glad to observe that it is somewhat modified and limited by the late case of *Hall* v. *Hall*, decided by the Court of Appeals in Chancery, in 1873: Law Rep. 8 Ch. Ap. 430. I quite agree with what Sir W. M. JAMES, L. J., says in this case: "The law of this land permits any one to dispose of his property gratuitously, if he pleases, subject only to the special provision as to subsequent purchasers and as to creditors. The law of this land permits any one to select his own attorney to

advise him: and it seems very difficult to understand how this court could acquire jurisdiction to prescribe any rule that a voluntary conveyance executed by a person of sound mind, free from any fraud or undue influence of any kind, and with sufficient knowledge of its purport and effect, should be void because the attorney of his own selection did not advise him to insert a power of revocation, or did not take his express direction as to the insertion or omission of such power."

The true rule is that laid down by Lord Justice TURNER, in *Toker* v. *Toker*, 3 DeG., J. & S. 487, 491, that the absence of a power of revocation is a circumstance to be taken into account, and is of more or less weight according to the circumstances of each case.

In the case now before me, I think it could not be seriously contended that, had powers of revocation been omitted from the conveyances made by Clifton, this fact would have been entitled to much, if any, consideration, in a suit brought by him to annul the settlements. To such a suit the chancellor might have said, as Chancellor HATHERLEY did in *Phillips* v. *Mullens*, "You were an exceedingly indiscreet and improvident young man. You made the settlements to guard against your own folly and extravagance. Of what advantage would it have been to place the money in this way out of your control, and then give you power to destroy the limitations whenever you pleased?"

But, whatever may be the true doctrine, all of the foregoing cases, and many more that might be cited, certainly do establish that it is ordinarily proper to insert a power of revocation in a voluntary settlement; nay, more, that the omission of such a power will subject the settlement to more or less suspicion. Certainly the practice in England for centuries has been to insert such a power in family settlements.

A practice which is thus approved by time, and which has received the sanction and encomium of courts of equity in both England and America, cannot be regarded as vicious or immoral. Should I hold that these settlements of Clifton are fraudulent and void as to his subsequent creditors, simply because they contain powers of revocation, I should overturn an ancient practice and a long course of decisions; nay, I should hold that courts of equity have themselves advised frauds to be committed.

The fact that Clifton inserted powers of revocation in his settlements, so far from proving that he contemplated defrauding his

future creditors, tends to show the contrary. Should he simply revoke the settlements, then, of course, the property conveyed would revert to him, and be liable at law for all his debts. And should he exercise the power of appointment for even the benefit of a stranger, then, according to an unbroken current of authority, the whole estate appointed would be liable in equity to his debts: *Thompson* v. *Towne*, 2 Vern. 319; *In re Davie's Trusts*, Law Rep. 13 Eq. 163; *Williams* v. *Lomas*, 16 Beav. 1; *Petre* v. *Petre*, 14 Id. 197. If, then, he had meditated a fraud, he would have omitted the power altogether. He would have relied altogether on the affection and beneficence of his wife to provide for him. To contend that he intended to defraud his creditors and at the same time to exercise the power of revocation arbitrarily, is to maintain a contradiction, since, as we have seen, the exercise of the power would, *ipso facto*, render the property liable in equity for his debts, unless, indeed, we can assume that he was gifted with a foresight which none of the facts warrant. A man, it is true, might make a voluntary settlement on his wife, and, contemplating that he might be adjudged a bankrupt in the future and be discharged from his debts, reserve a power of revocation for the very purpose of reinvesting himself, in such contingency, with the property, relying upon holding it free from debts contracted before bankruptcy. It is by no means certain that such a reliance would be safe. It is by no means certain that such a device would not be pronounced a fraud on the Bankruptcy Act. But assuming that it would not be fraudulent, there is nothing in the present case to suggest that the grantor had any such forethought, or was actuated by any such motive. At the time of the settlements he was not only free from debt, but possessed of a large estate. He was not engaged in trade, and all the testimony shows that nothing was farther from his contemplation than bankruptcy. That he did in fact become bankrupt in the short space of two years, is partly explained by the large shrinkage in the value of real property, and the decrease in its rents, but it is best accounted for by his frank confession that he has squandered much in reckless dissipation and gaming.

I do not mean to intimate that Clifton, having regard to the motive and circumstances which prompted these settlements, should not have reserved a power of revocation. Had he known his own habits as well as his acquaintances knew them, and had his motive been solely to guard against his follies, it would have been more

consistent with that motive to deprive himself of all dominion over the estate settled. But he could not know himself as others knew him, and he doubtless had implicit faith that, even should misfortunes overtake him, his affection for his wife would be a sufficient guaranty that he could not be persuaded to strip her of his bounty.

The settlements being of his own pure bounty, he might well wish to reserve to himself power to modify the limitations of them according to the future necessities and exigencies of his family. Then, too, the grantor has given reasonable explanation of the particular reservation contained in these deeds. He says that, at the time they were made, he contemplated removing to California, and that his object in reserving the powers of revocation was that he might change the investments from Kentucky to California. He did not expect to exercise the powers for his own benefit; he did not know that he could do so. He only contemplated settlements in California to the same uses declared in the original conveyances.

This suggestion derives additional force from the uncertainty in which the law of Kentucky stood at the time the conveyances were made in respect to the power of a married woman over her separate estates.

The Revised Statutes adopted in 1852 had, in effect, destroyed separate estates. They had, in effect, provided that where real or personal property should be conveyed or devised to the separate use of a married woman she should not alienate the same by joining her husband in an ordinary conveyance or in the exercise of a power, except when the estate was a gift, and then it might be conveyed by the consent of the donor, or his personal representative.

This provision was so anomalous that it gave much perplexity to the legal profession and produced much litigation. It was frequently amended, but, even down to the date of the settlements in question, its precise meaning and operation were not determined. So uncertain was its construction, that timid lawyers might have been found who would not have advised the acceptance of a conveyance from husband and wife, of an estate conveyed by the husband to the separate use of the wife. At any rate, Clifton might well have thought it best to guard against the uncertainty by reserving to himself a power which would avoid all difficulty.

Every grantor in England has, by virtue of the second section of the Statute of 27 Elizabeth, the substantial right to revoke and

annul his voluntary conveyance, since such conveyance is declared by said statute to be fraudulent as to subsequent purchasers for value, with or without notice: *Dolphin* v. *Aylward*, Law Rep. 4 Eng. and Irish Appeals 486; Roberts on Conveyances 39–41. A grantor may therefore revoke or annul his voluntary conveyance at any time by conveying the property included in such conveyance to a purchaser for value. But the statute is limited in its remedial operation to purchasers, and consequently such settlements can not be defeated by subsequent creditors: *Dolphin* v. *Aylward*, *supra*. So, also, the fifth section of the same statute, which makes all conveyances containing powers of revocation fraudulent and void as to subsequent purchasers, does not extend to creditors. Voluntary settlements, whether they do or do not contain powers of revocation, cannot be assailed by creditors unless they are fraudulent. They are revocable by the grantor either by virtue of the express power reserved or by virtue of subsequent conveyance for value, but it has never been held that they are on this account fraudulent as to creditors.

But, say complainant's counsel, Mrs. Clifton's title is but the "ghost of a title;" that the legal title is or was in her husband, who reserved to himself absolute power to revoke or to appoint to new uses, and that therefore it is not such a title as a court of equity will uphold.

I know it is sometimes said that a court of equity will not enforce every deed made by a husband to his wife: Bishop on the Law of Married Women, sect. 717. The cases usually cited to support this view are *Beard* v. *Beard*, 3 Atk. 71; *Moyse* v. *Gayles*, 2 Vern. 385; *Stoit* v. *Ayloff*, 1 Ch. Rep. 33.

Of all these cases it may be said that they were decided at a time when the rights of married women were not so fully acknowledged or so zealously protected by courts of equity as they are at the present day. It is also to be observed that in the first case the gift was so extravagant as to excite just suspicion of fraud and undue influence. In the second the court refused to aid the defective grant on the ground that it was without consideration. In the third the contract was executory. None of these cases would at all impeach a grant containing no more than a fair provision for the wife, and if they would, they are opposed to the cases heretofore cited in this opinion, to the well-settled doctrine of the Supreme Court of the United States, and to the whole current of later authority.

When the settlement is made by a husband free from debt, when it is induced by no fraudulent motive, when it makes no more than a reasonable provision for the wife, when it confers *any* benefit on her, I can conceive of no reason why a court of equity should decline to uphold it. Though the grant may not contain every provision which a chancellor would direct to be inserted in a settlement ordered by himself, though it contains reservations tending to impair the full benefit of the provision made for the wife, yet if the grant confer any substantial benefit on the woman, so long as she is in the actual enjoyment of that benefit, a court of equity should and will protect her.

Again, complainant's counsel, whilst they admit that a husband may, by direct conveyance to his wife, make a provision for her which will be enforced in equity, whilst they substantially admit that the provision made by Clifton for his wife was reasonable, whilst they admit that the grants made by him are not void, simply because of the powers reserved in them, yet they somehow insist that all these things combined vitiate the deeds. Their contention is, that as the legal title remained in the husband, notwithstanding the alleged conveyances, and that as this legal title is coupled with absolute dominion over the property, as a legal consequence of the reserved powers, the whole right and property remained in the husband, and passed on his bankruptcy to his assignee. But if, as we have seen, the husband may make a conveyance to his wife which will be upheld in equity; if, as we have also seen, the reservation of a power of revocation or of a new appointment does not render such settlement void, it is impossible to conceive that the union of the two particulars in the same instrument would destroy it. It is inconceivable that the mere union of two objections, each of which is a phantom, can render the compound substantial.

It must not be overlooked that complainant himself has appealed to a court of equity. In this court Mrs. Clifton's title is as complete as if she had been a *feme sole* when the conveyances were made to her. The husband's right and interest are not recognised in this court. Every argument, therefore, which is founded on the notion that any substantial title or interest remains in him can have no force in this forum.

The last proposition of complainant's counsel is, that by operation of the bankruptcy act, the property embraced in these settlements, or at least the powers therein reserved, which might be ex-

ercised by the grantor for his own benefit, passed to his assignee in bankruptcy.

We have seen that the title which the bankrupt at the time of his bankruptcy held in the property claimed, was held in trust for his wife. Now, by the express terms of the statute, property so held does not pass to the assignee in bankruptcy. Sect. 5053 of the Revised Statutes, provides that "no property held in trust by the bankrupt shall pass by the assignment."

To ascertain what property does pass to the assignee in bankruptcy, reference must be had to sections 5044 and 5046. The first of these sections provides that "as soon as the assignee shall be appointed and qualified, the judge or * * * register shall * * * assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books and papers relating thereto, and such assignment shall relate back to the commencement of the proceedings in bankruptcy, and by operation of law shall vest the title to all such property and estate, both real and personal in the assignee." The second provides that "all property conveyed by the bankrupt in fraud of his creditors, all rights in equity, choses in action, patent rights and copyrights, all debts due him or any person for his use, and all liens and securities therefor, and all his rights of action for property or estate, real or personal, and for any cause of action which he had against any person arising from contract or from the unlawful taking or detention or injury to the property of the bankrupt; and all his rights of redeeming such property or estate, together with the right, title, power and authority to use, manage, dispose of, sue for and recover or defend the same, as the bankrupt might have had if no assignment had been made, shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee * * * be at once vested in such assignee."

It will be perceived that powers of revocation and powers of appointment, though they be such as may be exercised by the bankrupt for his own benefit, are not enumerated among the things, which pass to the assignee either by virtue of the assignment or of the adjudication in bankruptcy. The "power" which is enumerated and does pass, is only the power to sell, manage, dispose of, sue for and recover, or defend the property and rights, which do pass.

A power is not property or an estate. A power to convey or

appoint property may be lodged in one having no interest whatever in the property over which the power is to be exercised or in one having an estate or interest in it. But in either case the power is distinct from the estate. It may be that a grant of property to A., to dispose of it as he should please, would invest him with a complete title; but a grant to A. for life, with remainder to such persons as he should by deed or will appoint, will not give him the absolute interest, although he might acquire it by the exercise of the power: Sugden on Powers, vol. 1, p. 120; *Maundrill* v. *Maundrill*, 10 Vesey 246; *Reed* v. *Shergold*, Id. 371; *Burleigh* v. *Clough*, 52 N. H. 272; *Collins* v. *Carlisle's Heirs*, 7 B. Mon. 13; *McGaughey's Adm'r* v. *Henry*, *&c.*, 15 Id. 383. So a conveyance by A. to B. and his heirs in trust for A. for life, remainder to such persons or uses as A. should appoint, and in default of appointment, in trust for C. and his heirs, would leave or vest in A. a life estate only. Or, if A. should convey to B. in trust for himself for life, reserving to himself an absolute power of revocation, still A. would have only a life estate in the property trusted. The power of revocation reserved would neither render the conveyance void nor have the effect of enlarging his estate. The learned judges who decided the case of *Willard* v. *Ware*, 10 Allen 263, certainly so understood the rule, else they need not have troubled themselves with the perplexing question presented in that case, whether the power of appointment reserved in the deed, which was there the subject of consideration, had been actually exercised.

The bankruptcy statute of 13 Eliz. "enables the commissioners to dispose of any estate, for such use, right or title as such offender (bankrupt) then shall have in the same which he may lawfully depart withal." And the statute of 21 James I. directs bankrupt law to be expounded most favorably for the relief of creditors. I quite agree with Sir EDWARD SUGDEN when he says, that "as a power is a mere right" to declare the trust of an estate upon which declaration the Statute of Uses immediately operates, and, as it is therefore clearly a use, interest, or right which the bankrupt "may lawfully depart withal," there is considerable ground to contend that the bargain and sale of the commissioner should have the same operation as the execution of the power by the bankrupt whilst solvent would have had, but such was never in fact the construction of these statutes. In *Townshend* v. *Windham*, 2 Ves. Sr. 3, and

in *Thorpe* v. *Goodall*, 17 Ves. 388, Lord KING is said to have held that in the case of a tenant for life, with power to charge 100*l*., the power was not such an interest as would pass to the assignees.

Holmes v. *Coghill*, 7 Ves. 498, was thus: Sir John Coghill, under a settlement made by himself in 1757, reserved the power to himself to charge the estate, situate in certain counties, with any sum not exceeding 2000*l*. Sir John was also entitled to other estates, remainder in tail to his oldest son. The son arrived of age in 1787, and thereafter he and the father suffered a recovery, and then made a settlement. This settlement embraced all or some of the property mentioned in the settlement of 1757. It expressly extinguished the power reserved in the settlement of 1757, but it directed the trustees to raise such sum, not exceeding 2000*l*., as Sir John should direct, and pay the same to him or his assigns; or, if the same should not be raised and paid over in his lifetime, then upon trust to raise the same at such time and pay the same to such person as Sir John should appoint. By his will, dated in 1775, and therefore before this settlement, Sir John gave the sum of 2000*l*., to be raised under the power, to be applied to the payment of his debts. There was a codicil to this will, which bore date subsequent to the settlement of 1788, but it took no notice of this power.

The bill was filed by creditors. *Held*, by the Master of the Rolls, Sir WILLIAM GRANT;

First. That the power reserved in the original deed of 1757 was discharged by the deed of 1787.

Second. The will refers only to the power reserved in the deed of 1757, and consequently it is no execution of the power reserved in the deed of 1787.

Third. There is an evident difference between a power and an absolute right of property.

Fourth. Equity will aid the defective execution of a power, but it can not itself execute a power.

The case was affirmed on appeal, 12 Vesey 206. On the appeal it was urged that there is a difference between an estate to be created under a power which must be limited to a third person and one which may be limited to the donor himself. It was conceded that in the first case the power must be asserted, but in the latter it was strongly insisted, that, as the donor had the same power over the estate which he has over his own estate, it should, in

equity, at least, be equally subject to his debts. But the court rejected the distinction, remarking: "If the argument in support of this appeal prevails, there must be an end of the distinction between the non-execution and the defective execution of a power."

In *Thorpe* v. *Goodale*, 17 Ves. 388, s. c. Id. 460, one who had been adjudged a bankrupt was seised for life of a certain estate, with a general power of appointment, with remainder in default of appointment to the heirs of his body. The suit was by his assignee to compel him to execute the power. *Held* by Lord ELDON that equity can not compel the execution of the power.

The learned chancellor, it is true, says that the question whether the power passed by operation of law to the assignee was not before him, but he refers to the opinion imputed to Lord KING in such terms as to show that he approves it.

Sir EDWARD SUGDEN says in his work on Powers, vol. 1, p. 225, that upon a bill filed by the assignees against the purchaser in this same case, the vice-chancellor was of opinion that the power did not pass to the assignee. He cites *Thorp* v. *Frere* (N. C., M. T. 1819), but I have not been able to find the case reported.

These decisions, doubtless, led to the enactment of 6 Geo. IV. 16, 5, 77. This statute provides that "all powers vested in any bankrupt, which may be legally executed for his own benefit (except the right of nomination to any vacant ecclesiastical benefice), may be executed by the assignees for the benefit of creditors in such manner as the bankrupt might have executed the same." A provision substantially the same has, I believe, been incorporated into every bankrupt act which has been passed in England since the date of the above statute, but no similar provision is to be found in our statute, and I must conclude that it was omitted *ex industria*. It certainly cannot be inferred that the draftsman of our statute was unfamiliar with this provision. It may be found in both of the English bankrupt acts of 1861 and 1869. And we know that many of the provisions in our original and amended acts were copied from these statutes.

But whether it was omitted intentionally or not may not be material. Our statute certainly contains no such provision, and it is impossible to construe it as passing to the assignee anything which the English statutes enacted prior to 6 Geo. IV. were held not to pass.

As the power reserved by the settlor in his settlements might be

exercised for his own benefit, it is clear that if he was a bankrupt in England, his assignee, in virtue of the recent statutes there, might exercise the power for the benefit of his creditors; but as we have no such statute here, as a power is neither real nor personal property, nor an estate of any kind, it is equally clear that this power did not pass to his assignees.

I have no doubt that, in respect to the property which does pass, under our statute, to the assignee, all the power and dominion which the bankrupt had over it before his bankruptcy likewise passes. Nor have I any doubt that the bankrupt, in virtue of the general provisions of the statute, as well as in virtue of the express terms of section 5050, may be required to execute any instruments, deeds and writings which may be proper to enable the assignee to possess himself fully of the assets; but it is only in respect to the assets of the bankrupt which have passed to the assignee that he can be required to execute any instruments, deeds or writings. He cannot be required to execute a mere power, since a power is not assets or property, or embraced among the things and rights which the statute declares shall pass to the assignee.

But complainant's counsel insist that the justices of the Supreme Court have given construction to our statute to the effect that it does embrace powers to dispose of or charge property. In proof of this, they refer to schedule B, which forms part of every bankrupt's petition, and which schedule was prescribed by the justices under authority of law (section 4490).

It is true that the caption of schedule B implies that the petitioner shall include therein "property in reversion, remainder or expectancy, including property held in trust for the petitioner, or subject to any power or right to dispose of or charge." It is also true that the directions in the body of that schedule seem to contemplate that the petitioner shall *mention* all "rights and powers wherein I (he), or any other person or persons in trust for me (him) or for my (his) benefit have any power to dispose of, charge or exercise."

No one more readily than I would submit to a decision of the Supreme Court, but I cannot regard this schedule, though nominally prescribed by its justices, as a decision of the court. The judges cannot in this way give an authoritative construction to the statutes.

Beside, the schedule does not purport to be a construction of the

statute, nor does it necessarily imply that all the rights enumerated in it will pass to the assignee in bankruptcy. It is true it would seem idle to insert in the schedule anything in which the assignee could have no interest; but the petitioner cannot be allowed to judge whether or not a given right or interest will pass to his assignee, and to include or exclude it from his schedule at pleasure. His assignee should be fully informed respecting his estate. He is entitled to have, and should have, all the information which the bankrupt himself has.

This may suggest some explanation of the requisitions contemplated by the form prescribed in the schedule. Certainly the form, in terms, contemplates that the schedule shall include a mere naked power to dispose of or charge property in which the bankrupt never had any interest, and which he could not dispose of or charge for his own benefit. Surely no one would be so bold as to contend that such a power passes in bankruptcy; yet, in my opinion, in view of the decisions in England before referred to, construing bankruptcy acts containing more comprehensive terms than ours; in view of the legislation there declaring that powers which a bankrupt may exercise for his own benefit shall pass to his assignee in bankruptcy; in view of the terms of our statute and of its omissions, there is scarcely more ground for the contention that a power which may be exercised by the donee for his own benefit passes to the assignee, either in virtue of the assignment to him or of the adjudication in bankruptcy, than a power which must be exercised by the donee for the benefit of a stranger.

Let an order be entered dismissing the bill with costs.

Appellate Court. Second District of Illinois.

CROFT PILGRIM *v.* THOMAS MELLOR.

Where an action, local in its nature, is founded on two things done in several counties, and both are material and traversable, and neither will alone support the action, it may be brought in either county.

Where a dam built in one county causes an overflow of land in another, the owner of the land may bring his action in either county at his election.

SUIT was commenced by Croft Pilgrim against Thomas Mellor before a justice in Stark county, where both parties resided, to recover for an injury done by the defendant in erecting a dam upon

his own premises, situated in the county of Stark, that so obstructed the natural flow of the water as to produce an injury to the adjoining land of the plaintiff, lying in Bureau county. The cause was removed to the Circuit Court of Stark county, and there dismissed for want of jurisdiction in the justice to try it.

An appeal was taken from that ruling to this court, and is here assigned for error.

The opinion of the court was delivered by

SIBLEY, J.—The only question to be determined in this case is whether the justice of the peace in Stark county had any authority to try the cause. That the action is local in its nature, and as a general rule in such cases, suit must be brought in the county where the land is situated, are propositions which admit of very little dispute. But it is insisted by appellant that cases like the present one, form an exception to this general rule, that is, where an act done in one county which produces an injurious effect in another, the remedy may be enforced in either. We have been referred to a number of authorities in support of that position. Not many of them though are directly in point. The books indeed are quite barren of decided cases on the precise question.

It is true that most of the elementary writers concur in stating the law as settled in favor of the position assumed by appellant: 1 Chit. Pl. 269; 3 Black. Com. 294; and note 4, Comyn's Dig. Act. N. 167; Com. Dig. 250, 251; Gould's Pl. 108. This doctrine originated chiefly from the decision in *Bulwer's Case*, 7 Coke 63, although reference is there made to the ruling in the year books in *The Abbott of Stratford's Case*, where a similar question arose. The principle, however, in the former case is stated in broad and general terms, that, "in all cases where the action is founded upon two things done in several counties, and both are material or traversable, and the one, without the other, doth not maintain the action, then the plaintiff may choose to bring his action in which of the counties he will." This view of the law was sanctioned in the *Mayor of London* v. *Cole*, 7 Term R. 583, where LAWRENCE, J., says that "the rule in *Bulwer's Case* gives a decisive answer to the application; it shows that where several material facts arise in different counties, the plaintiff may bring his action in either. In *Oliphant* v. *Smith*, 3 P. & W. 180, it is said "that every action founded upon a local cause shall be brought in the county where

the cause of action arises. * * * The only exception to this rule is the erection of a nuisance in one county to the injury of lands in another. There the action may be brought in either," and reference is made to Bac. Abr. 56, 57 and 58; Com. Dig. 250, 251. So in *Bardon* v. *Crocker*, 10 Pick. 383, the rule in *Bulwer's Case* is endorsed in the following emphatic language by the court. "The plaintiff may unquestionably maintain his action in either county, in Bristol where the obstruction was raised, as well as in Plymouth where the injury was sustained. The law to be collected from *Bulwer's Case*, is decisive upon this point, when one matter in one county is depending upon the matter in another county, the plaintiff may choose in which county he will bring his action:" Angel on Watercourses 420, states the law to be "where an injury has been caused by an act done in one county to land, &c., situate in another, the *venue* may be laid in either. The law to be collected from *Bulwer's Case* is decisive upon this point, when one matter in one county is depending upon the matter in another county, the plaintiff may choose in which county he shall bring his action."

A single case has been referred to, and doubtless the only one that can be found, by appellee where the point has been expressly decided against the ruling in *Bulwer's Case*. In *Warren* v. *Webb*, 1 Taunt. 379, referred to, a nuisance had been created in the county of Surrey by the defendant permitting the water from his eaves-trough to escape through the plaintiff's wall in that county, and suit was brought in Middlesex, where Lord MANSFIELD held it could not be maintained. Also in *Mersey and Irwell Nav. Co.* v. *Douglas*, 2 East 502, nothing was there decided except that the particular place in the county need not be correctly averred in the declaration, no reference was made to this exception to the rule in local actions. Nor is the case of *Thompson* v. *Crocker*, 9 Pick. 59, to the point, for in that case the action was commenced in the county of Plymouth where the injury was sustained, and it was held that the suit was properly brought. What was said about that being the only place to bring the action was mere *dictum*, and afterwards overruled in *Barden* v. *Crocker*. The case of *Eachus* v. *Trustees of Illinois and Michigan Canal*, 17 Ill. 534, and many other cases of that character were decided upon quite a different principle. There the land injured was situated in a foreign jurisdiction, and for that reason alone the courts refused to entertain the action. Angell in his treaty on Watercourses, sect.

421, remarks that, "it is hardly necessary to point out the difference there is, as regards actions and suits between the relation of counties in the same state and the relation between two distinct and independent states."

The case alluded to where the exception to the rule in local actions of a character like the one before us was repudiated, is that of *Woster* v. *Winnipiseogee Lake Co.*, 5 Foster 525. There it was held that the action could be maintained only in the county where the land was situated that sustained the injury. The authorities are reviewed in a very able opinion delivered by Chief Justice GILCHRIST and the conclusion arrived at that the rule established in *Bulwer's Case*, and subsequently recognised and adopted by the courts and elementary writers was "founded upon reasons which had long ceased to exist," and therefore should be abrogated. We are unable to assent to the conclusion or the reasons assigned for it. Even if the reasons that led to the adoption of this rule have ceased to exist, it does not necessarily follow that the rule itself should be annulled. As for instance, the reasons for selecting a jury to try the cause from the vicinage where the controversy arose. have long since ceased to exist, but the practice of taking them from the body of the county where the crime was committed or the suit is being tried, has continued as a wise one from the time of the Year Books until the present day without any very great desire to change it. Besides, in what respect has the reason ceased to exist which led to the establishment of this rule since it was adopted? By a legal fiction the court, in ancient times, permitted a party to bring suit in what was termed transitory actions in any county within the realm where the defendant could be found, by stating in the declaration where the cause of action arose and adding under a *videlicet* the county where the suit was brought. This was done for the purpose of facilitating the administration of justice. And was the reason any less forcible or has it ceased to exist, for, allowing a party to elect in cases like the present one to sue the defendant in either county where he might be found, or as in the case we are considering be deprived of any remedy at all except in some superior court that has the power to send its process out of the county? If a man is required to answer for his own wrongful act, is there any good reason why he should not be made to respond in the county where he committed the deed which produced the result, as well as where the injury was sustained? It is no answer to say